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CONSTITUTIONAL PROHIBITION OF LOCAL AND SPECIAL LEGISLATION IN PENNSYLVANIA.

(First Paper).

The constitutional development of the American states has demonstrated that the people cannot trust their representatives with unlimited legislative power. It is interesting to trace the growth of this feeling, visible in all, but now most prominent in those states like Pennsylvania, where one political party has so great numerical advantage that it can remain almost continuously in power, and has little fear of political punishment for misbehavior.

In colonial days the legislative assemblies were the champions of the cause of the people against the Crown. They were deemed the true exponents of the popular will. To them the colonists entrusted without reserve the preservation of the liberty which they had so dearly bought. And these assemblies, composed of the ablest and best men of the provinces, were worthy of the confidence reposed in them. Even if their character had not been high, there was little to tempt the members from the paths of rectitude.

Their power was necessarily limited, and the funds which they did or could control were so small in amount that there were few opportunities for making money out of the public service. That excrescence of modern growth, the professional politician, who feeds, vampire like, upon the arteries of the public revenue was happily unknown.

The result of this faith of the people in their representatives is shown in the constitutions which were enacted by the various states directly after the Declaration of Independence. The legislative power was, in most cases, granted without limitation of any kind, to a general assembly consisting often of but a single house. In several of these states the legislature even had the power to alter or amend the constitution at pleasure.

Few if any checks were deemed necessary; the governors had with the exception of Massachusetts and conditionally New York, no veto. This lack of a veto, however, was partly due to the feeling of antagonism toward the executive which, born during the ante-revolutionary struggles, yet remained among the citizens of the states. Indeed some states, notably Pennsylvania, provided for a committee to act as executive, so that no governor need be elected.

If it were possible in this paper to trace the growth of the feeling of distrust of the legislature which soon began, and the consequential limitations which were placed upon its power, we could see how very much the sentiment of the people has changed. The first record of dissatisfaction in Pennsylvania is found in the report of the committee of censors, who had been appointed to examine into the working of the legislature and to suggest amendments to the constitution. In 1874 this committee reported *inter alia*.

"That by the Constitution of the State of Pennsylvania, the supreme legislative power is vested in one house of representatives, chosen by all those who pay public taxes. Your committee humbly conceive, the said constitution to be in this respect materially defective.

"1. Because if it should happen that a prevailing faction in that one house was desirous of enacting unjust and tyrannical laws, there is no check upon their proceedings.

"2. Because an uncontrolled power of legislation will

always enable the body possessing it, to usurp both the judicial and the executive authority, in which case no remedy would remain to the people but by a revolution."

It would be presumptuous for me to treat at length this question of the growth of constitutional limitation upon the power of the legislature in Pennsylvania, after the very able and graphic discussion of it which was given by Mr. Samuel Dickson, then president of the Pennsylvania Bar Association, in his address to that body in 1896. This address will be found in the August number of *THE AMERICAN LAW REGISTER* for the year mentioned.

The same forces which have been at work in Pennsylvania have influenced the people of other states in much the same manner. The first general movement which came very soon, as above indicated, was to provide two houses, that one might operate as a check upon the other.

The second step was to deprive the legislature of any power to alter or amend the constitution without a direct vote of the people. By the time of the Civil War all such power had been taken away.

Then came the veto power. Experience has proven that while not a very powerful check, in view of the fact that the governor is usually of the dominant party, it has generally been used judiciously and to advantage.

It was soon seen, however, that these checks were not powerful enough. The character of the members of the legislatures had degenerated. They were no longer men of the keenest intellect and highest integrity. As must sooner or later be the case in a democracy the law makers came to be representative rather than the more able and upright men. Their intelligence was rarely above the average. Most of them were not accustomed to exert great influence in any circle of life. Take any average countryman from his farm; one who has never handled large sums of money; who has never had any nearer connection with great corporations than he has had from seeing their trains whiz by his farm or from a casual visit to their great establishments in his rare trips to the city; who has unconsciously learned to look upon those who possess money and power as quite apart from him and distinctly superior and perhaps antagonistic

to him; place such an one in the position of lawmaker—in his hands the ability to make or mar, create or destroy, these corporations whose existence he has heretofore only known about in a vague way; let him handle huge sums of money; let him feel the dizzy sense of power which a man possesses who has the people behind him; let him have a nearer view of the luxuries which money can buy; then when the siren voice of temptation comes to him, and he sees how very simple it is for him to secure these luxuries for himself, and as he may argue, really at the same time do nothing but vote as perhaps he would have voted anyway, it is perhaps no wonder that he succumbs. His conscience becomes blunter and blunter; he grows in shrewdness; he learns how to play the politician; how to keep the favor of his constituency; then he is valuable to his party and his political future is secure. Politics becomes his business and he is a dangerous man, a menace to the continued existence of free government.

It was of such men as this that the general assemblies of the states were partly composed. Having perhaps good intentions and honest motives at first, irresponsible power had proven the undoing of some, though possibly a minority of the members. Being tempted beyond their strength they had eaten of the forbidden fruit, and *Oliver Twist* like were developing an insatiable appetite for more. The views which some of the members of the constitutional convention of 1873 had of the Pennsylvania legislators of that time may be seen from the following selections from their speeches.

Mr. J. S. Black, who was perhaps more severe in his denunciation than any one else, said while discussing the propriety of requiring the members to take an oath:

"Another gentleman, the delegate from Erie (Mr. Walker), without intending to be at all condemnatory, but rather the reverse, declared it was no use to swear the members of the legislature, because they were, to his certain knowledge, so utterly degraded that they would take the oath and then immediately lay perjury upon their souls, without scruple and without hesitation. I believe him, for he certainly knows whereof he affirms. The evil fame of this thing has gone forth through the length and breadth

of the country, insomuch that the gentleman from Indiana (Mr. Harry White), the chairman of the committee on legislation, vouches for the statement: That when one of his colleagues in the Senate was traveling in Connecticut, and it became known that he was a member of our legislature, that fact alone raised a presumption against his honesty, so violent, that there was some hesitation about letting him go into an occupied room, lest the portable property to be found there might disappear when he went out. There was a time when membership of our state legislature was a passport to honor and admiration everywhere, from a Parisian drawing room to the cottage of a peasant. Now that same legislature is a stench in the nostrils of the whole world."—II. Constitutional Debates, 486 And again while discussing the alleged dishonesty of the state treasurers:

"No man holding that office can, by any possibility, make out of it one cent beyond the \$5,000 allowed him by law, without being guilty of some act as dishonest as the plainest stealing that ever was done by a common thief. Yet, somehow, the treasurer of the state gets off from his office enough to buy up a majority of the legislature, and after making all the deductions necessary for his reimbursement of that expense, there is enough left in his own pocket to enrich him beyond any other officer. These things, mind you, are not all done at once. The treasurer does not take all of this sum at one grab; nor does he buy up the members by wholesale. He has to make a separate bargain with each individual. If you could suppose one of these treasurers to be convicted of every distinct offence that he has been guilty of in a year, and then suppose him to be sentenced according to law, upon each conviction, what would become of him? At the most moderate calculation you can make, it would take him at least fifteen hundred years to serve his time out in the penitentiary [laughter]. and for a portion of that period he would be accompanied by a majority of the members of the legislature. [More laughter.] These are the men that are entrusted with the collection and expenditure of all your revenue, with the control of all your public affairs, and with the power which gives or withholds security to your lives and property."—II. Constitutional Debates, 488.

Mr. D. N. White, himself a member of the legislature, in reply to Mr. Black, said :

"It is fashionable nowadays to deride the legislature, and to speak of it with contempt. Every young fledgling who wishes to display his eloquence on the stump, or his flippant smartness in the press, and to air his virtue and his wisdom before a gaping crowd, attacks the legislature, and no one rebukes, no one comes to the defence of this foundation-stone of all republican governments. Can we do without a legislature? Is there any possible mode of preserving our free institutions without it? What folly; what madness then, to seek thus, with suicidal hands, to destroy what should be our glory, but which gentlemen assert on this floor is our shame.

"I do not deny that members of the legislature may have been corrupted. I do not deny that that body may have suffered deterioration in latter years. Is it any wonder? Patriotism is not so prevalent nowadays as to lead the men who fill all the active walks of life, and who are engaged in the mad scramble for wealth and power, to sacrifice their time to fill an office which yields no emoluments, and which, if we can believe what we have heard here, will only cover him with disgrace. Will it ever be any better if it is to be constantly held up to the scorn and detestation of the people?

"How does it come that a part of the members of the legislature are corrupt? Your individual or body of men outside of themselves must bribe them, if they are bribed. Now we know very well, that very few individuals have enough interest at stake, or have money enough to spare, to resort to wholesale systematic bribery. We are shut up then to the conclusion, that the main source of this corruption is found in those immense and wealthy corporations, which, as was said on this floor yesterday, have special privileges they want to obtain, or to prevent legislation in favor of other and rival interests. If cajolery or threatening cannot accomplish their ends, they resort to bribery by means of paid agents constantly on the ground. This corrupt and corrupting influence has done more to degrade the legislature, than all the other means combined. Evil disposed persons,

finding that men high in society, controlling immense interests, and claiming the most exalted integrity, systematically resort to corruption to carry their ends, have sought membership in the legislature, for the purpose of sharing in these golden spoils."—II. Constitutional Debates, 519.

In view of these facts some way had to be devised to force the legislative bodies of the various states to remain within reasonable bounds. To whom should the people turn for help? The second house, the governor's veto, the prohibition of the legislators from altering the constitutions—all had proven beneficial but they were not enough.

The only remaining method was to place concrete limitations upon the power of the legislature and trust their enforcement to the courts.

This has been done. To how great an extent can best be seen by comparing constitutions of recent enactment with those earlier promulgated. The early ones contained little but a bill of rights and a frame of government, casting the legislative power all upon the legislature and trusting it to use it honestly and judiciously. But notice what a change in the constitutions of late years. They deal not merely with matters usually deemed proper for constitutions but with almost every known branch of general law. This fact has excited the wonder of Hon. James Bryce, M. P., who in his "American Commonwealth," thus speaks of it:

"Among such provisions we find a great deal of matter which is in no distinctive sense constitutional law but general law, *e. g.*, administrative law, the law of judicial procedure, the ordinary private law of family inheritance, contract, etc., matters which seem out of place in a constitution because fit to be dealt with in ordinary statutes. We find minute provisions regarding the management and liability of banking companies, of railways, or of corporations generally; regulations as to the salaries of officials, the quorum of courts sitting in banco, the length of time for appealing, the method of changing the venue, the publication of judicial reports; detailed arrangements for school boards and school taxation (with rules regarding the separation of white and black children in schools), for a department of agriculture, a canal board, or a labor bureau; we find a prohibition of lotteries,

of polygamy, of bribery, of lobbying, of the granting of liquor licenses, of usurious interest on money, an abolition of the distinction between sealed and unsealed instruments, a declaration of the extent of a mechanic's lien for work done. We even find the method prescribed in which stationery and coals for the use of the legislature shall be contracted for, and provisions for fixing the rates, which may be charged for the storage of corn in warehouses. The framers of these more recent constitutions, have in fact neither wished nor cared to draw a line of distinction between what is proper for a constitution and what ought to be left to be dealt with by the state legislature. And, in the case of three-fourths at least of the states, no such distinction now, in fact, exists."

As Mr. Richard C. Dale in his article in the October number of *THE AMERICAN LAW REGISTER* points out, the courts themselves, moved perhaps by their knowledge of the dependence placed upon them by the people, have in some instances assumed the power to control legislative acts even in the absence of constitutional prohibitions. Whether this be a matter for congratulation or regret, experience has abundantly proven that to place restrictions in the constitution and then trust to the courts to enforce them is the best way yet devised to keep the legislature within bounds.

Perhaps the one restriction which more than all others has assisted in the elimination of dishonest laws is the one which prohibits local or special legislation. Such a provision prevents the passage of laws which being solely applicable to one place or to one person or corporation have for their purpose the furtherance of private interests. Indiana, I believe, was the pioneer in this respect, but she has been followed by many other states who have appreciated the beneficial results of such a clause in a constitution.

It is the purpose of this paper to examine the decisions in this state upon this feature of our new constitution. These decisions perhaps would have been neither numerous nor involved had it not been for the introduction of the theory that legislation for classes is not local or special, but general. This theory gives rise to wide latitude for legislative discretion as to the extent and purposes of classifica-

tion. The discussion will principally concern this question. The subject will be considered under four heads :

1. The theory of classification and its limitations.
2. Upon what character of subject laws relating to a single class may be enacted.
3. Effect of local laws upon otherwise general legislation.
4. Status of local laws passed without publication of notice.

I. THE THEORY OF CLASSIFICATION AND ITS LIMITATIONS.

Section 7, Article III, of the constitution of 1873 forbids the General Assembly of Pennsylvania to pass any local or special law concerning certain subjects therein enumerated. The list is long and covers almost every kind of legislation. The purpose of the section was not so much to protect certain subjects from the operation of local and special laws as it was to remove one of the greatest sources of corruption then existing.

As we read the earnest and eloquent speeches of the members of the convention assembled, and particularly the fiery invective of Judge Black, we are enabled to understand how deep was the infamy into which the legislatures of those days had fallen and how determined were these delegates to limit their power and as far as possible to remove temptation from them in the future.

Inasmuch as "the old law, the evil and the remedy" must be considered when we begin to inquire into the consideration of a constitution, it is important that at the outset we have firmly fixed in our minds the cause and object of the enactment of this clause.

The evil which gave rise to it and which more than all else was responsible for the calling of the convention was the wholesale passage of local and special legislation for improper purposes and by means of the most shameless buying and selling of legislative support. The responsibility for this kind of corruption must be largely ascribed to a body of men who made it their business to engineer measures through the general assembly, which were calculated to promote the interests of some powerful and rich corporation

or individual. This body, the real source of the abuse of the lawmaking power, was familiarly known as "the lobby." It was uniformly referred to by Judge Black as the "third house." While discussing the dishonesty of the legislators, he thus speaks:

"But, Mr. Chairman, I do not know that we ought to blame the members of the legislature too severely. Something ought to be allowed for the temptations with which they are surrounded. They walk among snares, and pitfalls, and man-traps. In fact they do not represent us. We are not governed by the men we send there. Our masters are the members of the lobby. They are organized into a third house, whose power is overshadowing and omnipotent. They propose the laws that suit themselves, and the interested parties who send them there. The other houses simply register their decrees. That our rights and liberties should be in such hands is disgusting in the extreme, for they are generally the most loathsome miscreants on the face of the earth."—II. Constitutional Debates, 489.

Mr. Wayne MacVeagh, while discussing the character of oath which the members of the legislature should be required to take, said:

"Considering the average character of American representatives, I believe it must be useful to require these gentlemen at the threshold of their entrance upon official life, to swear that they will not entertain association with the lobby. Certainly that will go a little way. It can do no harm; it may do some good. Degrading to anybody? I beg gentlemen to believe there is no degradation for the proudest in the land, to stoop to the lowest service in order to help to save American liberty and American government, in these days of their trial, and unless some will help in this work, they cannot be saved, and I trust, therefore, that we will at least go to the extent suggested. I do not know how the laws discussed this morning were passed. I do not know that corrupting influences were used or were not used. I do not know whether the Executive veto was interposed or withheld from improper consideration, but I know this, that the public interest is shamelessly disregarded, and that corruption stalks unabashed in your legislative halls through-

out all the American states, and even in the national capital itself; and knowing that, I believe that the professional lobbyist is largely the instrument whereby the money is carried to the representative, and I will go 'as far as the farthest' in any measures calculated to make that profession henceforth, in Pennsylvania, an impossibility; at least I will put up the barriers of self-respect; all the barriers of conscience between the legislator and the corrupting influences that assail him."—II. Constitutional Debates, 502.

Mr. Mantour pointed out that the amount of local and special legislation in recent years had been so great that the amount of general legislation was totally insignificant when compared with it. In discussing the clause forbidding such legislation, he said:

"In looking over the acts which the legislator has passed for the past few years, say commencing with 1866 and ending with 1872, we find the following results: In 1866, general laws passed were 50, special laws were 1,096; in 1867, general laws passed were 86, special laws were 1,392; in 1868, general laws passed were 73, special laws were 1,150; in 1869, general laws passed were 77, special laws were 1,276; in 1870, general laws passed were 54, special laws were 1,276; in 1871, general laws passed were 81, special laws were 1,353; in 1872, general laws passed were 54, special laws were 1,232. So you see that in seven years there were passed 475 general laws, and 8,755 private acts. The number of acts which the present legislature of 1873 have passed are many, and, I am told, will duplicate the number of the acts of any one former year. This is undoubtedly correct, and is but another proof of the necessity for this convention of adopting this section with all its paragraphs complete.

"From 1866 to 1871 the legislators passed for railroads, and granted them corporate privileges, some four hundred and fifty special acts bearing on railroads alone. These were, perhaps, not all the laws that were passed, in which railroads were not directly or indirectly interested.

"But, Mr. Chairman, what a fearful commentary is this on the abuses of special legislation. By a restrictive section in this constitution, the best and largest interests of a free

and industrious people like ours, in this state, would be protected. Without it we have not much faith in the ultimate results, for as we are carried forward by the political maelstrom, we shall find that our political rights will be swallowed up by granting special privileges to soulless corporations."—II. Constitutional Debates, 592.

From the remarks of these members it may be seen that the evil to be remedied was not so much improper legislation on any particular subject as it was the great opportunity which special legislation of any kind offered for trafficking in votes by rich and unscrupulous corporations through the medium of the lobby.

That this is true and that the remedy which was sought by the enactment of the clause under discussion was the removal of temptation by lessening the opportunities for promoting private interests is further shown by the remarks of Mr. George M. Dallas. While arguing against a proposition to allow local and special laws to be passed, fixing the rate of interest, so that corporations might be enabled to pay higher rates if they should so desire; he said:

"The gentleman from Philadelphia (Mr. Cuyler) says that we propose to reform the legislature of Pennsylvania, we need not fear in the future the evils of the past. Why then strike out this paragraph? Why leave it open to the legislature to do what you do not expect them to do? I do not care how many provisions we may enact to reform the legislature, we should still not lead them into temptation. I call the attention of the convention to the fact that the only mode we have thus far proposed for reform in this branch of our government, is restriction upon special legislation. This is the most important reform we have effected; and here, after we have restricted them by a long line of restrictions upon special legislation on every other conceivable subject, why should we be asked to make this peculiar omission in favor of corporations? What can be the reason for it? Why should we leave in the path of legislators to come, the rock upon which their predecessors have split? The danger sought to be removed by this paragraph is just that which the legislature should not be required to encounter.

"Sir, 'not to speak it profanely,' the prayer, 'Lead us not

into temptation,' was taught by the Redeemer of the world to His apostles, and they were told to utter it, and it will not be amiss even in the future for the chaplain of our legislature to still continue to repeat it, however much we may hope for reformation in the legislative body."—V. Constitutional Debates, 262.

Keeping in mind the evil and the remedy which the convention had in view we proceed to the investigation of the construction of the clause.

Thomas Raeburn White.